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Nos. 02-241 and 02-516

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents,

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents,

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE ASIAN AMERICAN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Asian American Legal Foundation ("AALF"), based in San Francisco, California, was founded to protect and promote the civil rights of Asian Americans.[1] Americans of

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[1] Letters of consent by all parties to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than Amicus Curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Asian origin have a particular interest in the law governing the use by public officials of race and ethnicity in admissions to state-supported academic institutions. Despite the fact that Asian Americans are considered culturally "different" from other Americans and have historically experienced—and continue to experience—overt racial and ethnic prejudice, diversity-based admission schemes are almost always used to exclude Asian Americans from educational institutions.

Diversity has been invoked as a justification for infringing upon the constitutional rights of San Francisco's Chinese American children. In *Ho v. San Francisco Unified School District*, 147 F.3d 854, 864 (N.D. Cal. 1998), schoolchildren of Chinese descent sued to end a consent decree that mandated racial and ethnic admissions quotas to achieve diversity. In *Ho*, after five years of litigation, and after the court found that the defendants had almost no chance of demonstrating a remedial purpose for their race-conscious admissions scheme, rather than face trial, the San Francisco Unified School District and the San Francisco NAACP abandoned the defense of the racial classification scheme and agreed to modify the consent decree that required the assignment of students to schools based on race. *See Ho v. San Francisco Unified Sch. Dist., San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999). AALF members supported the *Ho* litigation from the outset.

AALF is deeply concerned about the issues presently before this Court in *Gratz v. Bollinger*, No. 02-516, and *Grutter v. Bollinger*, No. 02-241. By granting preferences to applicants from certain ethnic groups, the admissions programs of the University of Michigan college and law school (together, the "University") place racial barriers before Chinese Americans and other "non-preferred" individuals that are unjustified by any remedial purpose. With the University unable to articulate any such remedial purpose, its ability to use race in admissions stands or falls on whether creation of

an ethnically diverse student body is a compelling government interest. A decision by this Court that diversity is a compelling government interest will have implications far beyond this case, however. Among other things, such a decision would strongly encourage the San Francisco Unified School District to return to a system of race-based assignments, which the plaintiffs in *Ho* fought so long to end.

If this Court rules that race-conscious treatment can be justified by the goal of diversity, the San Francisco school district will likely reimpose its racial quotas. Moreover, upon graduation from high school, members of the *Ho* plaintiff class will face a proliferation of similar barriers as they apply to college and, later, graduate and professional schools. Not that *any* person should be disfavored because of his or her race, but it would be ironic indeed were Chinese Americans to find themselves classified as a "non-preferred" ethnicity in the 21st century, when a dominant theme of their history in this country has been one of *de jure* discrimination.

Amicus curiae AALF submits that the examples of both this history and the *Ho* case caution against allowing equal-protection rights to be eroded in the name of social agendas that, no matter how well-intentioned, would subordinate the rights of the individual to the purported good of some greater whole. Accordingly, AALF and its constituents respectfully ask this Court to hear their arguments in favor of Petitioners.

SUMMARY OF ARGUMENT

In furtherance of the goal of a diverse student body, the University of Michigan has enacted race-based admissions programs at its college and law school which, unchecked by any remedial purpose, will continue in perpetuity. This use of race violates the Fourteenth Amendment right of University applicants to the equal protection of the laws. If the Court upholds the University's consideration of race in admissions, the decision will reawaken race-based treatment of individuals in settings far beyond the halls of higher education.

In San Francisco, for instance, such a ruling would threaten that, after a century-and-a-half-long struggle to be treated as individuals, children of Chinese descent might again be singled out for unequal treatment by the city's school system. In particular, any holding that elevated racial diversity to a compelling state interest would endanger the remedy recently secured in *Ho v. San Francisco Unified School District*. In that case, the school district sought to prevent "racial isolation" through a consent decree which classified all children in the district into nine arbitrarily-defined ethnic groups, and required that members of four ethnic groups be present at each of the city's schools. *Ho*, 147 F.3d 854, 856 (9th Cir. 1998). Furthermore, no one group could constitute more than 45 percent of the student body at any "regular" school or 40 percent at any "alternative" school, with the result that Chinese American children, who were the most numerous of the defined groups, faced formidable obstacles in gaining admission to schools of their choice. *See id.* at 856-59; David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 Harv. BlackLetter J. 39, 54 (Spring 2000).

The *Ho* case demonstrates the modern-day dangers of Kafkaesque social engineering in a multi-racial society. It also came against the backdrop of a long history of *de jure* discrimination against individuals of Chinese descent in San Francisco. Viewed by many as faceless members of a "yellow horde," these individuals were often the victims of state action aimed at protecting others from the supposed numbers of their race. *See, e.g.*, Charles McClain, *In Search of Equality* (Univ. of Cal. Press 1994); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Univ. of Ill. Press 1991); Victor Low, *The Unimpressible Race* (East/West Publishing Co. 1982). The onus extended to Chinese American children who sought to attend the state's schools. *See id.*; Joyce Kuo, *Excluded, Segregated and Forgotten: A*

Historical View of the Discrimination of Chinese Americans in Public Schools, 5 Asian L.J. 181, 207-208 (May 1998). In one such example, in *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco public schools to admit a Chinese American girl. In response, the State of California established separate "Chinese" schools, to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at 864.

As discussed more fully below, in case after case, the rights of people of Chinese descent were vindicated only by strict application of the Fourteenth Amendment's protection of individual rather than group rights. In *Ho*, for example, defendants agreed to cease assigning students by race only after the court made clear that they were unlikely to succeed in proving, under strict scrutiny, that their assignment scheme furthered any remedial purpose. *See Ho*, 59 F. Supp. 2d at 1024, 1025. The right secured in *Ho*—essentially the right of all Americans to be free of racial classification by the government—will again be endangered if this Court issues a ruling allowing state institutions to adopt race-based diversity programs, freed from the constraints of any remedial purpose.

There is ample reason to look askance at any program that classifies people by ethnicity to achieve some "ideal" racial composition. There is no difference between a policy of admitting some people because there are "not enough" of their race and a policy of excluding others because there are "too many" of theirs. This country's most respected universities have a shameful history of such policies, namely, the admission ceilings first adopted for Jewish students in the 1920s, out of concerns over Jewish "over-representation" at those schools. Indeed, the arguments the University now makes about the salutary effects of its race-conscious admissions policies here were eerily foreshadowed by Harvard University's claims about its Jewish quotas back then. "Harvard initiated its diversity-discretion program to decrease the number of Jewish students; President Lowell of Harvard

called it a 'benign' cap, which would help the University get beyond race." Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability Of Dworkin's Defense Of Affirmative Action*, 31 Harv. C.R.-C.L. L. Rev. 1, 36 (Winter 1996).

The San Francisco admissions policy challenged by the *Ho* litigants similarly reduced "over-representation" in the city's schools by Chinese Americans. Strictly limited to 45 or 40 percent of any school's student body (for regular and alternative schools), Chinese Americans were, because of their numbers, "capped out" at the most desirable schools. *See Levine, supra*, at 55-56. A notorious manifestation of this racial ceiling was at Lowell High School, considered the best high school in the district and one of the best in California. Lowell was the only school in the district that accepted and rejected applicants on the basis of numerical qualifications, i.e., grades and test scores. *See id.* Because admission on a strictly by-the-numbers basis would have caused Lowell's student body to be more than 40 percent Chinese American, the San Francisco school district required Chinese American applicants to score higher than members of any other racial group, including White, Korean and Japanese, to gain admission. *See id.*; Lawrence Siskind, *Racial Quotas Didn't Work in SF Schools*, op-ed, San Francisco Examiner, July 6, 1994. Thus, like Jewish applicants to American universities in the past, Chinese American applicants to Lowell throughout the 1980s and 1990s were being penalized for their ethnicity and success, until the *Ho* case finally brought these practices to an end.

As the jurisprudence of this Court makes clear, state use of race is always suspect and should be strictly reserved for remedial settings. That limitation is mandated by the personal nature of the right in question—a right that vests solely in the individual. *See Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200,

227 (1995). Accordingly, the personal right not to be burdened by racial classification should be abridged only in the narrow circumstance where such action is unavoidable in restoring to other individuals *their* usurped constitutional rights. Otherwise, as this Court warned in *Richmond v. Croson*, 488 U.S. 469, 493 (1989), the state's interference threatens to subvert the goals of the Fourteenth Amendment, promoting feelings of "racial inferiority" and "racial hostility."

Also demonstrating that diversity cannot rise to a compelling government interest is the impossible task the University faced in narrowly tailoring its admissions programs to its vague goal of diversity. As the Sixth Circuit noted in this matter, to be narrowly tailored, a race-conscious remedial program must be limited in scope and time, and must have been adopted only after consideration of race-neutral alternatives. *Grutter v. Bollinger*, 288 F.3d 732, 749-52 (6th Cir. 2002). At best, however, race is an unhappy proxy for the personal attributes the University believes constitute diversity. It is thus not strange that the University's diversity programs, enacted for pedagogical purposes, are capricious with respect to those that are favored, and formless, in that they will shift with every change in the pedagogical perception of diversity and will continue without end.

The Sixth Circuit implicitly recognized the impossibility of narrowly tailoring a diversity program. It accorded "deference" to the University with respect to "which groups to target" for its race-determinative admissions plans *Id.* at 751. It found that, unlike in a remedial setting, a diversity program "does not have a self-contained stopping point." *Id.* at 752. But there is nothing in equal-protection jurisprudence to support the notion that, under the strict-scrutiny test, a remedial program enacted to *restore* constitutional rights should be held to a higher standard than a diversity program that *deprives* disfavored individuals of their constitutional rights. Such logic would also fly in the face of the rule that, in exam-

ining use of race, there should be "consistency" and application of the "same standard of justification." *Adarand*, 515 U.S. at 224. The only reasonable conclusion is that the University's admissions programs cannot survive strict scrutiny.

In short, the University's goal of diversity, however well-intentioned, should be pursued using means other than the dangerous proxy of race. Here, the use of race is not needed to restore to any individuals their constitutional rights. Given that lack of necessity, there is simply no justification for race-conscious programs that abridge individual rights. As with the Hippocratic oath taken by physicians, here the cardinal rule should be, "First, do no harm."

For these and other reasons set forth herein, the University's race-conscious admissions programs should be found unconstitutional.

ARGUMENT

I. USE OF RACE IS "ODIOUS" AND SHOULD BE RESERVED FOR SITUATIONS WHERE IT WILL VINDICATE RATHER THAN TRAMMEL THE RIGHTS OF INDIVIDUALS.

A. A Decision Elevating Diversity To A Compelling State Interest Would Likely Result In Renewed Discrimination Against San Francisco's Chinese American Schoolchildren.

This Court has repeatedly warned that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (*quoting Hirabayashi v. United States*, 320 U.S. 81, 100). Use of race "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* at 643. Accordingly, the Fourteenth Amendment provides that "[n]o State [actor] shall . . . deny to

any person within its jurisdiction the equal protection of the laws." *See Croson*, 488 U.S. at 493.

There can be no doubt that the University's race-conscious admissions programs burden individuals of the non-favored races. The University argues that the diversity brought to the halls of its college and law school is well worth the sacrifice of those displaced by its use of race. Whatever the benefits of this skin-deep diversity, however, it comes at a heavy price. It would also be a mistake to assume that the issues at stake here concern only the pedagogical needs and goals of higher education. Any decision upholding diversity as a compelling government interest justifying the use of race would have a chilling effect on individual rights far beyond academia. Even in education alone, the influence of such a decision would be felt all the way down to the elementary-school and kindergarten level.

In particular, in a relevant case which AALF respectfully brings to the Court's attention, such a decision would likely result in San Francisco's schoolchildren of Chinese descent again facing race-based discrimination in the city's public school system. In *Ho v. San Francisco Unified School District*, which began in 1994, San Francisco's Chinese American schoolchildren were forced to turn to the courts for redress of their Fourteenth Amendment rights, in order to halt the school district's policy of classifying and assigning them to the city's K-12 schools on the basis of their race. *See Ho*, 147 F.3d 854; *Ho*, 59 F. Supp. 2d 1021 (on remand); *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (1977) (decision giving rise to appeal in 147 F.3d 854).

In *Ho*, the plaintiffs collaterally challenged a consent decree entered in *San Francisco NAACP v. San Francisco Unified School District*, 576 F. Supp. 34 (N.D. Cal. 1983). In that earlier case, a race-based assignment program was enacted with the goal of preventing "racial isolation" in the city's schools. *See Ho*, 965 F. Supp. at 1322; *see also Ho*,

147 F.3d at 859. As explained when the consent order was entered: "The key objective of the student desegregation plan is to eliminate racial/ethnic segregation or identifiability in any school, classroom, or program, and to achieve throughout the system the broadest practicable distribution of students from all the racial/ethnic groups comprising the general student population." *San Francisco NAACP*, 576 F. Supp. at 40. Under the admissions program, nine ethnic groups were arbitrarily defined, including "Chinese"; members of at least four of the groups were required to be present at each school; and no one group could represent more than 45 percent of the student body at any regular school or 40 percent at any alternative school. *See id.; see also Ho*, 147 F.3d at 856.

While the San Francisco admissions program was purportedly remedial in nature, in fact, the promotion of diversity was the only real purpose. In particular, there had never been any findings of a constitutional violation to necessitate a race-based remedy. *See Ho*, 965 F. Supp. at 1320. And significantly, the "remedy" was secured on behalf of a class defined as "*all* children of school age who are, or may in the future become, eligible to attend the public schools of the S.F.U.S.D." *Id.* at 1322 (emphasis added); *San Francisco NAACP*, 576 F. Supp. at 36. As described by the district court, "This plan is designed to provide relief for all San Francisco school children; it does not address the needs of any particular racial or ethnic group." 576 F. Supp. at 49.

Moreover, by the time of the *Ho* challenge, the school district had enlarged the original nine racial categories to thirteen, to take into account the emergence of additional racial groups in the district. *See Ho*, 147 F.3d at 858. Nevertheless, despite the numerous racial categories, no provision was made for the growing number of children of mixed race, or for those who preferred not to declare their race. *See id.* at 862 ("They were not given the option of refusal.").

B. The Experiences Of The Named Plaintiffs And Class In *Ho* Demonstrate That Mandated Diversity Harms Individuals, Even Members Of Groups That Have Historically Suffered Discrimination.

The heaviest burden of the school district's diversity assignment program fell on students identified as "Chinese." With a long history in San Francisco, over the years Chinese Americans had come to constitute the largest identifiable ethnic group in the city. *See* Levine, *supra*, at 55-56. Accordingly, in the student assignment process, a child identified as Chinese was most likely to be "capped out" at many desired schools and forced to attend a non-chosen school, often far from his or her neighborhood. *See id.* At Lowell High School, an academic "alternative" high school that admits students from middle school based on a score derived from a combination of grades and standardized-test results, the mandated diversity was maintained by forcing Chinese applicants to score higher than applicants of all other groups, including White, Japanese, and Korean, in order to gain admission. *See id.*; Siskind, *supra*. Also, even where preferences were not required to maintain the racial caps, the district nevertheless adopted a policy of granting preferences to applicants classified as "Hispanic" and "African American." *See Ho*, 147 F.3d at 858.

The parents of affected children and other concerned Chinese Americans, including officials of the Chinese American Democratic Club, remonstrated with the school district, but the unlawful discrimination continued. *See Levine, supra*, at 56-58. Parents' frustration mounted as their children were turned away from schools for no other reason than that "there were 'too many Chinese.'" *Id.* at 61. Children were stigmatized. "He was depressed and angry that he was rejected because of his race. Can you imagine, as a parent, seeing your son's hopes denied in this way at the age of 14?"

Julian Guthrie, *S.F. School Race-Bias Case Trial Starts Soon*, San Francisco Examiner, Feb. 14, 1999, at C-2 (quoting mother of student "capped out" at Lowell). As Lee Cheng, Secretary of AALF, testified in a written statement for hearings held by the U.S. House of Representatives, Sub-Committee on the Constitution:

> Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

Lee Cheng, *Group Preferences and the Law*, U.S. House of Representatives Sub-Committee on the Constitution Hearings (June 1, 1995), *at* http://www.house.gov/judiciary/274.htm.

Another byproduct of the mandated diversity plan was "rampant dishonesty," as parents of all races attempted to misreport children's racial identity to gain admission to desired schools. *See* Michael Dorgan, *Desegregation or Racial Bias?*, San Jose Mercury, June 5, 1995, at 1A. "[S]ome black families in Bayview-Hunter's Point have gone so far as to take Hispanic surnames to protect their children from busing." *Id.* at 10A. "People know if they want to go to a particular school that has a lot of Caucasians, they should put down something other than Caucasian, and they do." *Id.* at 10A (quoting School Board President Dan Kelly).[2]

On July 11, 1994, the *Ho* class action was filed by three Chinese American schoolchildren denied admission to city schools because of their race, suing on behalf of themselves and "all children of Chinese descent of school age who were current residents of San Francisco and who were eligible to

[2] On the school enrollment forms, parents were threatened with "perjury" if they misreported the race of their child. *See Ho*, 147 F.3d at 862.

attend public schools of the school district." Levine, *supra*, at 62-63. The named plaintiffs' situations amply illustrate the discrimination meted out to Chinese American schoolchildren by the school district:

> Brian Ho was five years old at the time the suit started. In 1994, he was turned away from his two neighborhood schools when he applied to kindergarten because the schools were capped out for children of Chinese descent. He was assigned to a school in another neighborhood.
>
> Patrick Wong, then fourteen years old, applied for admission to Lowell High School in 1994. He was rejected because his index score was below the minimum required for Chinese American applicants. His score was high enough that he would have been admitted to Lowell had he been a member of any other racial or ethnic group recognized in the consent decree. He was rejected at two other high schools because Chinese Americans were capped out at both. When he tried to apply to a fourth high school, a newly established academic high school, his mother was told that all spaces for Chinese Americans were filled even though spaces for applicants of other racial or ethnic groups were still available.
>
> The family of Hillary Chen, then eight years old, moved from north of Golden Gate Park to a neighborhood south of the park in December 1993. Hilary was not allowed to transfer into any of three elementary schools near her new home because Chinese Americans were capped out at all three schools.

Id. at 61.

C. Settlement Was Reached In *Ho* Only Because The Law Was Clear That The Goal Of Diversity Would Not Justify The School District's Use Of Race.

After some five years of vigorous litigation, the *Ho* case settled on the first day of trial, with defendants agreeing

to cease using race to assign students to the city's schools, and agreeing to end the mandatory requirement of self-identification by race on student enrollment forms. *See Ho*, 59 F. Supp 2d 1021 (approving settlement).

Beyond question, settlement in *Ho* would never have been reached if the district court and the Ninth Circuit (on an interlocutory appeal from the district court's denial of plaintiffs' request for dissolution of the consent decree) had not emphasized to defendants that, under this Court's decisions in cases such as *Croson* and *Adarand*, the goal of diversity provided no justification for use of race, and that at trial the school district would have to prove a past constitutional violation tied to its present use of race—a burden defendants were extremely unlikely to carry. *See Ho*, 147 F.3d at 864-65 ("[T]he temporary expedient of using race is to compensate individual persons themselves injured by the malevolent use of race."); *Ho*, 59 F. Supp. 2d at 1024-25 (noting burdens placed by Ninth Circuit's ruling and district court's prior finding that "defendants had shown little likelihood of prevailing at trial").[3]

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[3] Even after settlement was reached, the school district tried to obtain the district court's approval of a new admissions plan that, like the University's admissions programs at issue here, would have used race as a non-exclusive "diversity" factor. Under the proposed plan, instead of imposing the hard-and-fast quotas and caps ended by the settlement, the school district would have granted preference in student assignment based on a "diversity index" composed of four factors, one of which was race/ethnicity:

(1) Low socio-economic status;

(2) Limited proficiency in English;

(3) Limited math and reading achievement levels; and

(4) Racial/ethnic diversity.

Levine, supra, at 110-11. The district court struck down the proposed assignment plan for failing to meet the constitutional test of strict scrutiny and for violating the terms of the settlement agreement. *See id.* at 113-14. Again, without "diversity" as a compelling state interest, defendants could not meet the constitutional test.

Thus, key to the *Ho* plaintiffs' vindication of their constitutional rights was the recognition by the district court, and ultimately the school district, that the goal of diversity could not be used to justify the district's use of race. Therefore, if this Court, in deciding *Gratz* and *Grutter*, elevates diversity to a compelling government interest, the San Francisco Unified School District will most likely again try to implement a race-based student assignment program, depriving the city's Chinese American schoolchildren of the relief secured in *Ho*. It is also likely that other school districts around the country would similarly subject millions of other schoolchildren to race-conscious assignment policies.

D. The Historical Treatment Of Chinese Americans Amply Illustrates The Wrong Of Treating Individuals As Faceless Members Of Racial Groups.

The experience of Chinese Americans, as exemplified in *Ho* and other cases, illustrates why group identity should never be elevated above individual rights. The struggle by Chinese American schoolchildren in *Ho* against race-based treatment was particularly ironic in that, for much of the preceding century and a half, Americans of Chinese descent had struggled against racial discrimination, often in San Francisco. Throughout their history in this country, individuals of Chinese descent have sought to participate in and contribute to American society but have often faced significant barriers because of their race. *See, e.g.*, McClain, *supra*; Sandmeyer, *supra*; Low, *supra*. Their experiences included some so dire as to give rise to the expression "a Chinaman's Chance," a term meaning "having little or no chance of succeeding." News Watch Diversity Style Guide, *at* http://

newswatch.sfsu.edu/guide. Time and again, Chinese Americans have received equal treatment only after appealing to the federal judiciary for the protections afforded individuals by the United States Constitution.

For example, in *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546), a district court invalidated San Francisco's infamous "Queue Ordinance" on equal-protection grounds. In *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880), the court found unconstitutional an act forbidding Chinese Americans from fishing in California waters. In *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880), the court declared unconstitutional a provision of California's 1879 constitution that forbade corporations and municipalities from hiring Chinese. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court ruled that Chinese were "persons" under the Fourteenth Amendment and could not be singled out for unequal burden under a San Francisco laundry licensing ordinance. In *In re Lee Sing*, 43 F. 359 (C.C.D. Cal. 1890), the court found unconstitutional the "Bingham Ordinance," which mandated residential segregation of Chinese Americans. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), this Court ruled that a Chinese American boy, born in San Francisco, could not be prevented by San Francisco officials from returning to the city after a trip abroad.

Chinese American schoolchildren were long denied access to the public schools. In *Tape v. Hurley*, 66 Cal. 473, 6 P. 12 (1885), the court had to order San Francisco public schools to admit a Chinese American girl who was denied entry because, as stated by the State Superintendent of Public Instruction, public schools were not open to "Mongolian children." *See* McClain, *supra*, at 137. In response, the California legislature authorized separate "Chinese" schools, to which Chinese American schoolchildren were restricted by law until well into the twentieth century. *See Ho*, 147 F.3d at

864; *see also* Kuo, *supra*, at 207-08 (noting that "Chinese" were segregated even when "Japanese" were not).

Even though it is not widely recognized, the experiences of Chinese American schoolchildren had much to do with the shaping of "separate but equal" jurisprudence as it related to education. In *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902), the district court denied a child of Chinese descent the right to attend his neighborhood school in San Francisco, reasoning that the "Chinese" school in Chinatown was "separate but equal." 119 F. at 382. In *Gong Lum v. Rice*, 275 U.S. 78 (1927), this Court affirmed that the separate-but-equal doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), applied to schools, finding that a nine-year-old Chinese American girl residing in Mississippi could be denied entry to a "white" school because she was a member of the "yellow" race. *Id.* at 87.

Thus, in *Lee v. Johnson*, 404 U.S. 1215 (1971), Justice Douglas wrote that California's "establishment of separate schools for children of Chinese ancestry . . . was the classic case of *de jure* segregation involved [and struck down] in *Brown v. Board of Education*, 347 U.S. 483 [1954]. . . ." *Id.* at 1216. "*Brown v. Board of Education* was not written for blacks alone. It rests on the Equal Protection Clause of the Fourteenth Amendment, one of the first beneficiaries of which were the Chinese people of San Francisco. *See Yick Wo v. Hopkins*, 118 U.S. 356." 404 U.S. at 1216.

In the context of the long history of Chinese Americans in San Francisco, the *Ho* case presents distinct ironies. As described above, the challenged race-based assignment plan had as its stated goal the promotion of diversity and elimination of racial identification, and yet San Francisco was and is one of the most diverse cities in the nation, a fact reflected in the composition of its schools. It boasts a true multi-ethnic population with no single group in the majority, and in many ways exemplifies the diversity toward which the

country strives. In spite of all this, the goal of diversity became a tool of oppression wielded principally against Chinese American schoolchildren—members of a community that had suffered similar discrimination in the past. If nothing else, *Ho* shows that once the state is allowed to use race for non-remedial purposes, the rights of all individuals are in danger.

E. Placing Priority On Group Identity Inevitably Results In The Trammeling Of Individual Rights.

Proponents of diversity as a compelling interest typically focus on the perceived pedagogical value or other benefits that diversity brings. *See Grutter*, 288 F.3d at 736-37. Underlying this argument, however, is the mistaken assumption that it is just to deprive an individual of benefits because the "group" with which the individual is identified already has "more than its fair share." This kind of thinking invariably is used to oppress individuals, diminishing them as persons in proportion to the perceived numbers of their "group." Obviously, in most cases, the burden will fall heaviest on the poorer or weaker members of the disfavored group.

In one noteworthy and cautionary example in higher education, in the 1920s, Harvard College and other prominent universities reacted to the perceived "over-representation" of Jews in their student bodies by setting up informal quotas and "diversity" programs that persisted through the 1950s. *See* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws*, 66 Brook. L. Rev. 71, 111-12 (Spring 2000); Alan M. Dershowitz and Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 385-399 (1979); Nathan Glazer, *Diversity Dilemma*, The New Republic, June 22, 1998, *at* http://www.tnr.com/archive/0698/062298/glazer062298.html. These institutions

argued that their diversity schemes were beneficial to all and would lessen ethnic tension. "Harvard initiated its diversity-discretion program to decrease the number of Jewish students; President Lowell of Harvard called it a 'benign' cap, which would help the University get beyond race." Kang, *supra*, at 36. Yet the undeniable effect was to single out individuals for unequal treatment merely because they were identified with a particular religion or ethnicity. "In the 1930s, it was easier for a Jew to enter medical school in Mussolini's Italy than in Roosevelt's America." Siskind, *supra*.

In *Ho*, a similar sentiment was voiced—that "Chinese" already had "enough," and that Chinese American individuals who were turned away had no right to complain:

> "[T]he Chinese are the largest group at most of the best schools in the city. They can't have it all. If anything, I'd say lower the caps, don't raise them—otherwise we're headed back to segregated schools, only all Chinese instead of all white."

Selana Dong, *"Too Many Asians": Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 Stan. L. Rev. 1027, 1057 n.36 (May 1995) (citation omitted) (quoting Lulann McGriff, former president of San Francisco NAACP); *see also* Levine, *supra*, at 138 (observing that to some, "the *Ho* case is about how much is 'enough' for one racial or ethnic group").

Today, even outside of the *Ho* litigation, some similarly consider Chinese Americans to be over-represented in the nation's academic institutions. *See* Glazer, *supra*; Dong, *supra*, at 1057, nn.4-5; Leo Rennert, *President Embraces Minority Programs*, Sacramento Bee (Metro Final), Apr. 7, 1995, at A1 (reporting that former President Clinton, in speaking favorably about race-based admissions programs, commented that otherwise, "'there are universities in Cali-

fornia that could fill their entire freshman classes with nothing but Asian Americans'"). "To keep a lid on the number of Jewish students—denounced as 'damned curve raisers' by less talented classmates—the universities imposed quotas, sometimes overt, sometimes covert . . . . Today's 'damned curve raisers' are Asian Americans, who are winning academic prizes and qualifying for prestigious universities in numbers out of proportion to their percentage of the population." Kang, *supra*, at 47 n.189 (quoting Don Nakanishi, *A Quota on Excellence*, in The Asian American Educational Experience: A Sourcebook for Teachers and Students, at 275 (quoting Los Angeles Times reporter Linda Matthews)) (internal quotation marks omitted). And again, mandated "diversity" is seen as the answer. *See* Pat K. Chew, *Asian Americans: The "Reticent" Minority And Their Paradoxes*, 36 Wm. & Mary L. Rev. 1, 61-64 (Oct. 1994) (universities use quotas to limit Asian American enrollment).

The goal of mandated diversity, espoused by the University here, emphasizes the group over the individual. The Constitution says nothing about "ideal" racial mixtures or diversity, however. Nor should it, given that individuals have an undeniable existence with interests that can be trammeled, while race is a malleable concept at best, easily subject to misuse. As history shows, discretion to consider ethnicity in the pursuit of a diverse student body invariably leads to oppression. *See* Dershowitz & Hanft, *supra*, at 399 ("Both then and now . . . such unlimited discretion makes it possible to target a specific religious or racial group—then for decrease, and now for increase . . . .").

It is for such reasons that the Constitution has been wisely construed to protect individuals against classification by race. In *Brown v. Board of Education*, 347 U.S. 483, for example, this Court recognized the inherent inequality in allowing schools to segregate students on the basis of race. That same reasoning should apply here.

F. A Pedagogical Desire For Diversity Cannot Rise Above The Constitution's Guarantee Of Equal Protection To Individuals.

This Court's jurisprudence teaches that the Fourteenth Amendment's stricture on race-based treatment by the state is absolute, except where such action is necessary to further the compelling state interest of vindicating the rights of individuals who were subject to racial discrimination. As this Court warned in *Croson*, 488 U.S. 469, unless racial classifications are "reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility." *Id.* at 493. As explained by the dissent in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), later vindicated by this Court in *Adarand*, 515 U.S. 200, "[m]odern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination." *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting).

Thus, as this Court declared in *Adarand*, there are no "benign" racial classifications. "[T]he Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." 515 U.S. at 227 (emphasis added). As this Court has repeatedly emphasized, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the *individual*." *Shelley*, 334 U.S. at 22 (emphasis added).

While the Fourteenth Amendment protects individuals from racial classification, there is no countervailing principle that would subordinate individual rights to the University's perceived need for some ethnic mix constituting "diversity." The goal of diversity cannot substitute for a remedial purpose, because diversity is "simply too amorphous, too insubstantial,

and too unrelated to any legitimate basis for employing racial classifications." *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting). More important, in any equal-protection analysis, the rights of the individual are paramount. In both *Ho* and the instant cases, a state actor has essentially argued that diversity programs are benign because they are not motivated by animus and are applied impartially. In *Shelley*, 334 U.S. 1, this Court rejected the notion that equal protection is not violated when individual rights are trammeled as a result of the state's impartial enforcement of a scheme with discriminatory impact on an individual. In that case, the Court considered whether states might enforce covenants in residential deeds restricting occupancy to Caucasians. *See* 334 U.S. at 4-7. Rejecting the argument that, because the state courts were equally willing to uphold restrictive covenants against Caucasians, such action did not violate individuals' rights to equal protection, the Court explained, "The rights established are *personal* rights.... Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* at 22 (emphasis added).

Similarly, here, as in *Shelley* and *Ho*, the University may not trammel the rights of individuals of one group merely because it does so dispassionately and is equally willing to trammel the rights of members of other groups. And here, as in *Shelley* and *Ho*, because the Constitution protects individuals, the rights of affected individuals should be placed above all other considerations, including the perceived good of having present some ideal racial mix.

G. The Result In *Bakke* Does Not Support The Non-Remedial Use Of Race.

In upholding the University's race-conscious admissions programs, the courts below reasoned that they were following Justice Powell's articulation in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that in certain

hypothetical circumstances diversity could rise to a compelling government interest. *See Grutter*, 288 F.3d at 739; *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 820, 825 (E.D. Mich. 2000). That statement, however, was essentially dictum expressed only by Justice Powell. Also, Justice Powell failed to consider that the Harvard Plan, upon which he expressly based his dictum concerning a constitutional diversity-discretion plan, was originally designed to keep Jews out of Harvard College:

> In *Bakke*, for example, Justice Powell lauded Harvard University's "soft" diversity-discretion model of affirmative action as constitutionally preferable to a strict, "hard" quota system as adopted by the University of California. He failed to mention, however, that Harvard's program had anti-Semitic roots. Harvard initiated its diversity-discretion program to decrease the number of Jewish students ....

Kang, *supra*, at 36. More to the point, the *Bakke* opinion did not uphold the admissions program in question; it found it unconstitutional. *See* 438 U.S. at 272, 320. Thus, Justice Powell's speculation as to a program that might be found constitutional can say little about the present case. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 n.22 (1979) (noting this Court's policy of "strict necessity" in deciding constitutional issues, as well as its long-standing refusal to issue advisory opinions).

Similarly, here, the University's admissions programs do not merit lenient treatment because of any purportedly attenuated effect on non-favored applicants, or because race is only one of the factors considered in admissions. As stated by this Court, it is not the ultimate result of the racial classification that constitutes the harm, but the imposition of the classification itself: "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Northeastern Fla. Ch. of*

Assoc. Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 666 (1993).

Furthermore, for the applicants who are affected, the effect is neither attenuated nor slight. That is, even if the University's consideration of race diminished the odds of admission for non-favored applicants, such as Chinese American applicants, by only 1 percent—the University concedes the figure is much higher—it would still constitute a higher barrier than that faced by members of favored races. Most important, it is undeniable that many such applicants are denied entry solely based on race. That is, notwithstanding the University's attempts to hide race among the other factors considered, the rejected applicant would have been granted entry if he or she had been a member of a favored race. For such an applicant, the precise odds of entry and any attenuated effect of race in the process are quite meaningless; this person was rejected because of race.

Therefore, even if the University is right that its use of race creates a diversity that promotes the general good, the "mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight," *Croson*, 488 U.S. at 500, and cannot rise to a compelling government interest. "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting*, 497 U.S. at 602 (O'Connor, J., dissenting).

II. AS THERE IS NO OBJECTIVE STANDARD BY WHICH RACIAL DIVERSITY MAY BE MEASURED OR LIMITED IN SCOPE OR TIME, THE UNIVERSITY'S ADMISSIONS PROGRAMS CANNOT BE NARROWLY TAILORED TO ADVANCE A COMPELLING STATE INTEREST.

A. The University's Lack Of An Objective Standard For "Racial Diversity" Renders Its Use Of Race Capricious.

As set forth above, the University's goal of diversity cannot constitute a compelling government interest to justify classification of applicants by race. Even assuming it could, however, the University's use of race is too vague and capricious to withstand strict scrutiny. As this Court has stated, "racial classifications . . . are constitutional only if they are narrowly tailored measures that further compelling government interests." *Adarand*, 515 U.S. at 227. "The means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (opinion of Powell, J.).

Under the admissions programs at issue, preference is granted to applicants from ethnic groups "which have been historically discriminated against," in particular, African Americans, Hispanics, and Native Americans. *Grutter*, 288 F.3d at 737; *see also Gratz v. Bollinger*, 122 F. Supp. 2d at 827. There has never been any showing, however, that members of the favored groups will contribute more to diversity than members of other ethnic groups that are also under-represented. Here, "[t]he concept of 'diversity' is so vague that it lends itself to a myriad of widely divergent and ever-changing definitions capable of masking the criteria actually at work." Dershowitz & Hanft, *supra*, at 404. For example, while the University's programs target "African

American," that itself is an imprecise term, including groups that genetically and culturally are quite different from each other:

> "Black" subjects, for example, may include slave descendants, whose ancestors were from West Africa, but may also include recent immigrants from South Asia, the horn of Africa, South Africa, certain Pacific Islands, and even Australia. The genetic diversity between some of these groups (as estimated from a number of DNA homology studies) is a great as the disparity between some groups of "blacks" and "whites."

James E. Bowman, *Anthropology: From Bones to the Human Genome*, 568 Annals Am. Acad. Pol. & Soc. Sci., 140, 141 (March 2000). The University's capricious preferences violate the principle that use of race must be justified by particularized findings, to guard against the danger that it "is merely the product of unthinking stereotypes or a form of racial politics." *Croson*, 488 U.S. at 510.

Similarly, in the case of the law school, the director of admissions stated that the goal is to produce a "'critical mass' [of each group] with sufficient numbers to ensure under-represented minority students do not feel isolated . . . ." *Grutter*, 288 F.3d at 737. Other witnesses "testified that 'critical mass' was not a set number or percentage." *Id.* Given that none of the favored applicants is entitled to a remedial preference, and that a non-favored applicant is denied admission for each preferential admission granted, a program narrowly tailored to cause as little harm as possible cannot leave this "critical mass" undefined.

B. Lacking Any Attainable Goals Or Temporal Limits, The University's Admissions Programs Would Classify Students By Race Forever.

As in *Ho*, the University's admissions programs fail strict scrutiny because, lacking particularized and attainable goals, they would continue to classify applicants by race forever.

Use of race is "odious" even where necessary, *Reno*, 509 U.S. at 643, and this Court has wisely cautioned against upholding race-conscious programs that are "ageless in their reach into the past, and timeless in their ability to affect the future." *Croson*, 488 U.S. at 498 (internal quotation marks omitted) (quoting *Wygant*, 476 U.S. at 276); *see also Adarand*, 515 U.S. at 238 (program must be appropriately limited in time).

In *Grutter*, the Sixth Circuit acknowledged that, under the vague guidelines of the University's law school admission program, the University's use of race would continue indefinitely. 288 F.3d at 751-52. The Sixth Circuit erred, however, in finding that a temporal limit was not necessary because "[u]nlike a remedial interest, an interest in academic diversity does not have a self-contained stopping point." *Id.* The Sixth Circuit's ruling ignores this Court's admonishment that there must be "consistency" and the "same standard of justification" in reviewing programs for possible equal protection violations. *See Adarand*, 515 U.S. at 224. It also would produce the illogical result that a race-conscious program designed to remedy actual *de jure* segregation, that is, one that seeks to restore to individuals their constitutional rights, would be held to a stricter standard than a race-conscious program designed merely to further pedagogical ends.

One also cannot assume, as did the Sixth Circuit, that in any case, "the admissions policy is 'sensitive to the possibility that [it] . . . might someday have satisfied its purpose.'" *Grutter*, 288 F.3d at 752 (citation omitted). In *Ho*, where there was a purported remedial purpose, diversity was nonetheless a goal that clearly was going to be pursued forever. *See* Levine, *supra*, at 51, 56. Here, as the Sixth Circuit itself recognized, there is no prior constitutional violation against which to gauge the completeness of the present "remedy." The law school's diversity program favors members of ethnic groups deemed under-represented by granting them

preference in the admissions process. *Grutter*, 288 F.3d at 737. While the focus is on African American, Hispanic, and Native American candidates, the University, freed from the constraints of any remedial purpose, also looks to the ethnicity of applicants who purportedly represent the diversity of the world. *See id.* at 736 (highlighting Vietnamese, Bangladesh, and Argentinian applicants).

In short, the University's race conscious admissions programs are impermissibly tailored to the perpetual use of race.

C. The University Failed To Consider And Use Race-Neutral Means To Achieve Diversity, Preferring The Impermissible Proxy Of Race.

The University's admissions programs are also flawed because it failed to consider and use the true, race-neutral measures of the diversity it seeks, preferring instead the easy but flawed proxy of race. In *Croson*, 488 U.S. 469, one of the reasons this Court struck down a program which granted race-based preferences in construction contracts was that the city had failed to consider race-neutral alternatives. *See id.* at 507; *see also Adarand*, 515 U.S. at 237-38 (upholding same requirement). Here, where the goal is not to restore individual rights but simply to promote diversity for pedagogical purposes, the University's failure to find alternatives that do not trammel individual rights is even more glaring.

The University is mistaken in assuming that color of skin is an adequate proxy for the personal attributes it seeks, particularly in our multi-ethnic society. This Court has explained that such thinking "bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. at 647. "We have rejected such perceptions elsewhere as impermissible racial stereotypes." *Id.* Indeed, as various

scholars have found, race-conscious admissions programs do foster unfortunate stereotypes, detrimental even to members of those ethnic groups "favored" by the program:

> When few Jews could get into Ivy League schools, and Jewish students had to be superqualified to gain admission, a Jewish stereotype was created: Jews are smart. Admitting black students by lower standards has precisely the opposite effect: it reinforces the pernicious notion that blacks are not academically talented.

Stephan Thernstorm and Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. Rev. 1583, 1608 (June 1999).

True diversity is a goal best pursued without recourse to race. It is simplistic to assume that any given African American candidate has suffered adversity and disadvantage, thereby gaining valuable perspective or experience, while assuming that the opposite is true for any given Chinese American candidate. Even where such a generalization could be made for a group as a whole, common sense tells us it would never be true of all individuals in the group. *See Thernstrom, supra*, at 1624-25 (focus on race ignores true measures of diversity, producing "homogeneously upper-middle-class" student bodies). Returning to the example of the two random African American and Chinese American candidates, a statement that the person has experienced adversity might be true for both, either, or neither of the two. All that can be known a priori is that both individuals deserve to be considered on their own merits, undistorted by the prism of a diversity scheme such as those advocated by the University here.

CONCLUSION

In the 19th century, children of Chinese descent were denied equal access to San Francisco public schools solely because of their race. A hundred years later, in the *Ho* case, Chinese Americans were again singled out for unequal treatment. If nothing else, these experiences demonstrate the danger of allowing the state to use race except in the most limited circumstance, such as where such use is strictly necessary in order to provide a remedy to individuals deprived of constitutional rights. Pedagogical needs and goals, including the desire for a diverse student body, simply cannot provide such a compelling interest. Any program that allows state actors to promote diversity through consideration of race will inevitably result, as in *Ho*, and as in the instant cases, in discrimination against individuals based on race. And, as such use of race will be unbounded by any fixed, remedial goal, it will continue without end, to the detriment of our society.

For all of the reasons set forth herein, the University's race-conscious admissions programs further no compelling government interest, are not narrowly tailored to further any such interest, and should be found to violate Petitioners' right to the equal protection of the laws.

Respectfully submitted,

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